IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 14642 of 2006

For Approval and Signature:

HONOURABLE THE ACTING CHIEF JUSTICE Y.R.MEENA Sd/-

HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ASIAN FOOD INDUSTRIES THR'ITS PARTNER-KUMARBHAI - Petitioner(s)

Versus

UNION OF INDIA THR' SECRETARY & 4 - Respondent(s)

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Appearance :
MR JOSEPH KODIANTHARA, COUNSEL WITH MR BHARAT T. RAO for Petitioner(s) : 1,
MR JM MALKAN, for Respondent No.1.
RULE NOT RECD BACK for Respondent(s) : 1 - 2, 5,
SERVED BY RPAD - (R) for Respondent(s) : 1 - 2.
MR RM CHHAYA for Respondent(s) : 2 - 4.

MR PURVISH J MALKAN for Respondent(s) : 1,
RULE SERVED BY DS for Respondent(s) : 5,

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CORAM : HONOURABLE THE ACTING CHIEF JUSTICE Y.R.MEENA

and

HONOURABLE MR.JUSTICE D.A.MEHTA

Date : 1/09/2006

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1 This petition under Article 226 of the Constitution challenges Notification No.19 (RE-2006)/2004-2009 dated 4/7/2006 whereby retrospective effect is given to Notification dated 27/6/2006 and Notification dated 3/7/2006 so as to be operative with effect from 22/6/2006. The following prayers are made :

> *"(A) Your Lordships be pleased to issue an appropriate writ, order and/or direction, quashing and setting aside the impugned notification No.19 (RE-2006) 2004-2009 dated 4/7/2006 passed by respondent No.2 giving retrospective effect to the Notification No.15(RE-2006) 2004-09 dated 27/6/2006 and No.17(RE-2006) 2004-09 dated 3/7/2006 w.e.f. 22/6/2006, holding that the said Notifications are illegal, unjust, bad in law, against the provisions of settled principles of law, discriminative, violative of Article 14 of the Constitution of India, contrary to principles of natural*

justice, and also contrary to the provisions of General Clauses Act,1897, as the said Notification cannot be made operative with retrospective effect when principal Act does not provide the same, in view of the judgment of Hon'ble Supreme Court as well as for the reasons stated in the memo of this petition;

(B) Your Lordships be pleased to issue an appropriate writ, order and/or direction which Your Lordships may deem fit, and quash and set aside the letter dated 28/6/2006 and 11/7/2006 issued by the respondent No.3 and 4 as the same are also against the provisions of law and against the judgment of Hon'ble Supreme Court;

(C) Pending admission and till final disposal of this petition, Your Lordships be pleased to grant stay of operation, execution and implementation of the impugned notification No. 19 (RE-2006) 2004-2009 dated 4/7/2006 passed by respondent No. 2 giving retrospective effect to the Notifications No.15 (RE-2006) 2004-09 dated 27/6/2006 and No.17 (RE-2006) 2004-09 dated 3/7/2006 w.e.f. 22/6/2006, and further be pleased to direct the respondent authorities to permit the petitioner to load the remaining 87 containers which are lying at Kandla Port area for export forthwith on such terms and conditions as may be deemed fit, just and proper by this Hon'ble Court in the interest of justice;

(D) Your Lordships be pleased to grant such other or further reliefs as may be deemed, fit, just and proper in the interest of justice and fairness of things".

2 The petitioner, a partnership firm, is engaged in the business of purchase and sale of various kinds of pulses and grains etc. The petitioner is also exporting the said goods to various overseas buyers under Open General Licence (OGL) after receiving confirmed orders. In the course of such business the petitioner-firm received orders from foreign importers from middle-east for export of 20,331 M.Ts. of various kinds of pulses and grains equivalent to 107 containers. The petitioner, therefore, entered into a contract with overseas importer which contains clauses for damages and penalty in the event of the failure of the petitioner to fulfill commitment made under the contract. It is the say of the petitioner that the petitioner has received 20% advance payment i.e. U.S.$ 2,94,942/- on 9.5.2006 towards the supply of various kinds of pulses and grains. The petitioner has already shipped 20 containers between 22/6/2006 and 24/6/2006 while 87 containers are to be shipped. The said 87 containers were to be loaded on vessel on 26/6/2006 but the loading could not take place due to non arrival of the vessel. It is further averred by the petitioner that 87 containers have already been cleared for export by competent Authorities and are lying at Kandla port. That the said 87 containers have been handed over to the Customs Authorities for which "let export" orders have been made and the goods are in ready to export condition.

3 In exercise of powers conferred by section 5 of the Foreign Trade (Development and Regulation) Act,1992 (Foreign Trade Act), respondent No.2 issued Notification dated 27/6/2006 prohibiting export of various goods mentioned therein for a period of six months from the date of issuance of the said Notification. It is the say of the petitioner that vide entries pertaining to Lentils and Tur (Arhar) the other consignments which are ready to be shipped are covered apparently, but for the reasons urged the prohibition would not apply to the case of the petitioner. Vide Notification dated 3/7/2006 the period of ban under earlier Notification dated 27/6/2006 came to be extended up to 31/3/2007. However, vide another Notification dated 4/7/2006 (impugned Notification) the earlier Notification dated 27/6/2006 has been amended so as to give retrospective effect with effect from 22/6/2006 on the ground that the announcement regarding the decision of the Government to impose ban/prohibition of the items mentioned in the Notification had received wide publicity in the print and electronic media on 22/6/2006. Respondent No.4 therefore vide communication dated 11/7/2006 has conveyed the decision of Commissioner of Customs, Kandla and stated that only export consignments which were handed over to Customs up to 22/2/2006 would be allowed and in relation to export consignments which were handed over to Customs for examination etc. between 22/6/2006 and 27/6/2006 exports would not be allowed, Shipping Bills need to be cancelled and goods, if arrived, need to be taken back.

4 The learned Advocate appearing on behalf of the petitioner has assailed the impugned Notification dated 4/7/2006 pointing out that the case of the petitioner is not governed by the said Notification because by virtue of order made under section 51 of the Customs Act, 1962 (Customs Act) and paragraph No. 9.12 of the Handbook of Procedures Volume. I in relation to Foreign Trade Policy 2004-2009 any modification to the disadvantage of the exporters cannot be made applicable to the consignments already handed over to the Customs for examination and subsequent exports upto the date of the public notice. That the petitioner having handed over the consignments to the Customs Authorities admittedly on 23/6/2006 and 24/6/2006 and order of "let export" having been made in relation to each of the 9 consignments (Annexure-F) the case of the petitioner is directly falling within paragraph No.9.12 of the Handbook of Procedures. He, therefore, urged that impugned Notification dated 4/7/2006 and consequential communications from the Customs Authorities be quashed and set aside directing the respondent authorities to permit the petitioner to load the remaining 87 containers which are lying at Kandla Port area. He has also placed reliance on the judgment rendered by the High Court of Delhi on 18/8/2006 in W.P.(C) 11691-11692/2006 & CM 8807/2006 between *Agri Trade India Services Pvt. Ltd. and Union of India and others* to point out that impugned Notification dated 4/7/2006 has been held to be ultravires section 5 of the Foreign Trade Act, and therefore also the petitioner was required to be granted reliefs as prayed for.

5 Mr.Malkan appearing on behalf of respondent Nos. 1 & 2 submitted that the only exception carved out in impugned Notification dated 4/7/2006 was pertaining to irrevocable letters of credit opened upto 22/6/2006 as per transitional arrangement notified under paragraph No.1.5 of the Foreign Trade Policy 2006 and even in cases of irrevocable letters of credit opened on or after 22/6/2006 the exception by way of transitional arrangement was not applicable. That the petitioner had not even opened any irrevocable letter of credit at any point of time and hence was not entitled to any relief.

5.1 Referring to paragraph No.9.12 of the Handbook of Procedures it was submitted that the opening portion of the said paragraph specifically talked of reckoning date of shipment/dispatch for the purpose of export and thus disadvantage could only be in relation to the advantages specified in Chapter Nos. 4 and 5 of the Foreign Trade Policy. That no other disadvantage like suffering of damages etc. on frustration of the contract would form a valid ground to carve out an exception. He submitted that the decision rendered by the High Court of Delhi on 18/8/2006 in W.P.(C) 11691-11692/2006 & CM 8807/2006 between *Agri Trade India Services Pvt. Ltd. and Union of India and others* was also therefore not applicable on the facts of the case.

6 Mr.R.M.Chhaya, learned Counsel appearing on behalf of respondent Nos. 3 and 4 has supported the stand of the respondent authorities. However, to a pointed query as to whether the consignments which were handed over to the Customs Authorities

for examination had been cleared, he referred to the affidavit-in-reply to submit that the consignments had been received for examination on 23-24/6/2006 and the procedure as required by sections 50 & 51 of the Customs Act were undertaken by the concerned authorities.

7 Section 50 of the Customs Act relates to making Entry of goods for exportation and such entry is made by presenting a shipping bill to the proper officer. Section 51 of the Customs Act relates to Clearance of goods for exportation and lays down that where the proper officer is satisfied that any goods entered for export are not prohibited goods and the exporter has paid the assessed duty, if any, and any charges payable under the Customs Act, the proper officer may make an order permitting clearance and loading of the goods for exportation. It is an admitted position that respondent Nos. 3 and 4 have undertaken the procedure laid down in sections 50 & 51 of the Customs Act. In relation to 4 shipping bills out of 9 shipping bills the inspection has been carried out on 23/6/2006 and 'let export' order was issued on 23/6/2006. In relation to the remaining 5 shipping bills the date of inspection is 24/6/2006 and the date of 'let export' order is also 24/6/2006. As per the details placed on record on behalf of respondent Nos. 3 and 4 in the form of print out from Indian Customs E.D.I. System it is apparent that the Customs Authorities have allowed stuffing of the cargo viz. Clearance of the containers.

8 The only question that survives therefore is whether impugned Notification dated 4/7/2006 operates as a bar or not, the

goods having been cleared for export admittedly after 22/6/2006 but before 27/6/2006. The impugned Notification dated 4/7/2006 has been quashed as being ultravires the Foreign Trade Act by the High Court of Delhi, and therefore on this count alone Notification dated 27/6/2006 cannot be made retrospectively applicable with effect from 22/6/2006. The petition is required to be allowed on this count because once the impugned Notification is quashed and set aside by a Competent Court for all intents and purposes the said Notification cannot operate throughout India.

9 However, apart from that, as the parties have addressed the Court at length in relation to the scope of paragraph No. 9.12 of the Handbook of Procedures for complete adjudication the said issue is also dealt with hereinafter.

10 Paragraph No. 9.12 appears in Chapter 9 of the Handbook of Procedures and the relevant portion as is necessary for the present reads as under :

"9.12 Date of shipment/despatch for the purposes of exports will be reckoned as under :-

Mode of Transportation.		*Dae of Shipment/Dispatch.*			
(i)	*By Sea*	*xxx*	*xxx*	*xxx*	*xxx*
(ii)	*By Air*	*xxx*	*xxx*	*xxx*	*xxx*
(iii)	*By Post Parcel*	*xxx*	*xxx*	*xxx*	*xxx*
(iv)	*By Rail*	*xxx*	*xxx*	*xxx*	*xxx*
(v)	*By registered Courier Service.*	*xxx*	*xxx*	*xxx*	*xxx*
(vi)	*By Road.*	*xxx*	*xxx*	*xxx*	*xxx*

> *However, wherever the Policy provisions have been modified to the disadvantage of the exporters, the same shall not be applicable to the consignments already handed over to the Customs for examination and subsequent exports upto the date of the Public Notice".*

11 Thus, on a plain reading paragraph No. 9.12 provides for different dates of shipment/dispatch depending on the mode of transportation, but a general exception is carved out which stipulates that wherever policy provisions have been modified to the disadvantage of the exporters, the same shall not be applicable to the consignments already handed over to the Customs for examination and subsequent exports upto the date of the public notice.

12 The submission that the phrase *"disadvantage of the exporters"* should only mean that advantages/benefits specified in Chapter No.4 and Chapter No.5 of the Foreign Trade Policy are not being allowed, or are being withdrawn, or are being denied and no other disadvantage is contemplated does not merit acceptance. Admittedly the term "disadvantage" has not been defined either under the Foreign Trade Act, or under the Foreign Trade Policy, or under the Handbook of Procedures and therefore ordinary

meaning shall have to be assigned to the said term. The term disadvantage means (1) an unfavourable circumstance or condition (2) damage to one's interest or reputation (Ref: Concise Oxford Dictionary, Ninth Edition). Thus, it is apparent that when the goods which are already cleared by the Customs Authorities are not being permitted to be exported by virtue of the modification made by impugned Notification the modification operates to the disadvantage of the exporter-petitioner and the case of the petitioner falls within the exception. To reiterate, there is no dispute that the consignments had already been handed over to the Customs upto the date of the public notice viz.27/6/2006.

13 Even if for the sake of argument the contention raised on behalf of respondent Nos. 1 and 2 is accepted that the term “disadvantage” has to be given a restrictive meaning by reading the same to mean that the advantages stipulated by Chapter No.4 and Chapter No.5 of the Foreign Trade Policy are not available to an exporter, then also, once exports of consignments already handed over to the Customs are not being permitted by virtue of the modification the petitioner would lose the advantages stipulated in Chapter No.4 and Chapter No.5 of the Foreign Trade

Policy. It is an accepted position that such advantages are available only on exports being effected. Therefore, if exports are not permitted the petitioner-exporter does not get any advantages statutorily laid down by the Foreign Trade Policy and therefore also the provisions can be said to have been modified to the disadvantage of the exporter, but the petitioner having already handed over consignments to the Customs such modification would not be applicable to the case of the petitioner.

14 In the aforesaid facts and circumstances of the case, it is apparent that the impugned Notification dated 4/7/2006 cannot be permitted to operate. Notification dated 27/6/2006 would be applicable from the date of the issue of the Notification, i.e. 27.6.2006 and any consignments cleared by the Customs prior thereto cannot be hit by any modification by way of subsequent Notification (dated 4/7/2006) so as to work to the disadvantage of the petitioner-exporter in light of the provisions of paragraph No.9.12 of the Handbook of Procedure. The High Court of Delhi having already quashed and set aside the said Notification dated 4/7/2006 it is not necessary to repeat the said order. The impugned Notification remains quashed and set aside.

15 Hence, the respondent authorities cannot prevent the petitioner from exporting consignments which have already been cleared by the Customs Authorities admittedly on 23-24/6/2006. Accordingly the respondent authorities are directed to permit the petitioner to load the cargo which is lying at Kandla port area for export forthwith, viz., the goods which have already been cleared under section 51 of the Customs Act on 23/6/2006 and 24/6/2006. The petition is accordingly allowed. Rule made absolute. There shall be no order as to costs.

Sd/-
(Y.R. Meena, Actg. C.J.)
Sd/-
(D.A.Mehta, J.)

m.m.bhatt